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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE AMERICAN FINANCIAL SERVICES ASSOCIATION, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The Chamber of Commerce of the United States, the American Financial Services Association, and the American Insurance Association hereby move, pursuant to Rule 37.2, for leave to file the attached brief in support of the petitioners. The three amici organizations all have a substantial interest in the issue presented in this case, which concerns the scope of federal diversity jurisdiction.[1]

Founded in 1912, the Chamber of Commerce of the United States is the world's largest business federation. The Chamber represents an underlying membership of more than 3 million businesses of every size, with nearly 2,000 state and local chambers and associations, along with 97 American Chambers of Commerce abroad. The mission of the Chamber is to promote democracy, individual opportunity, and free enterprise. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

The American Financial Services Association (AFSA) is a trade association representing approximately 360 non-traditional market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing over 20 percent of all consumer credit in this country. Since its founding in 1916, AFSA has been dedicated to assuring a strong and healthy broad-based consumer lending services industry that (i) provides the public with a quality and cost effective service; (ii) promotes

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[1] Petitioners have consented to the filing of this brief; their consent is reflected in correspondence that has been lodged with the Clerk. Respondents have not consented to this submission.

a financial system that enhances competitiveness; and (iii) supports the responsible delivery and use of credit and credit-related products.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing over 400 companies that write property and casualty insurance in every state and jurisdiction of the United States. AIA's goals are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains five regional offices, and retains legislative counsel in every state. Among its other activities, AIA prepares amicus briefs in cases before state and federal courts on issues of importance to the insurance industry.

The "common defense" rule adopted by the Fifth Circuit in this case, if left undisturbed, will have a direct and significant impact on Amici's respective memberships and on commercial interests throughout the nation. In view of the dramatic expansion of business tort litigation in certain states, it is more important than ever that courts protect out-of-state businesses' valuable statutory right to a federal forum. The very purpose of diversity jurisdiction is the avoidance of local prejudice—a protection invaluable to both the rule of law and the functioning of our free market economy. The Fifth Circuit's common defense rule dramatically impairs an out-of-state defendant's ability to remove state tort litigation to federal court when no real in-state defendant is present. If this Court does not intervene, this rule will further fuel the explosion of business tort

litigation in certain state jurisdictions, to the detriment of the nation's economy.

Accordingly, Amici move for leave to file the attached brief to assist the Court in evaluating the petition for a writ of certiorari in this case.

Respectfully submitted.

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICI[2]

The interest of the Amici is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

An en banc ruling from a deeply divided Fifth Circuit Court of Appeals has placed that court in direct conflict with the Ninth Circuit on a critical issue of federal diversity jurisdiction. Under the doctrine of fraudulent joinder, the presence of an in-state defendant in a complaint does not defeat diversity jurisdiction if there is no reasonable possibility that the plaintiff will recover against that defendant. Under these circumstances, the in-state defendant is deemed to be fraudulently joined and may be ignored for purposes of diversity jurisdiction.

In this appeal, a majority of the Fifth Circuit departed from that long-standing rule and imposed a new hurdle for defendants seeking to invoke the fraudulent joinder doctrine. Joining the Third Circuit Court of Appeals in *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), the Fifth Circuit held that before a court may consider whether fraudulent joinder applies, it must first decide whether the defense that would defeat the claims against the resident defendant would also apply to the claims against the non-resident defendant. Pet. App. 8a-9a. If the defense is "common" to all defendants and equally disposes of all

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[2] This brief was not authored in whole or in part by counsel for any party in this case, and no one other than amici, their members, and their counsel made any monetary contribution to its preparation or submission. S. Ct. R. 37.6.

claims in the case, the court cannot find fraudulent joinder and must remand the case to state court, even if there is no reasonable possibility that the plaintiff will recover against the resident defendant. The Ninth Circuit has reached the opposite conclusion, holding that the resident defendant may be deemed fraudulently joined even though the claims against the out-of-state defendant fail for the same reason. *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998).

This conflict among the circuits on the scope of fraudulent joinder arises from the courts' differing interpretations of *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U.S. 146 (1914), a long-dormant decision of this Court. In using *Cockrell* as the basis for their common defense rule, however, the Third and Fifth Circuits extended that decision far beyond its factual context. Moreover, the decision in *Cockrell* preceded this Court's sea-change ruling in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). Before *Erie*, when federal courts sitting in diversity decided disputed questions based on federal common law, as required by *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), considerations of comity would have made courts more reluctant to retain cases based on diversity jurisdiction. Any comity concerns that may have informed the *Cockrell* decision, however, were greatly diminished after *Erie*, which overruled *Swift* v. *Tyson* and empowered federal courts to apply state law.

The question presented in this case is of critical importance to corporations that participate in interstate commerce. Even members of the plaintiffs' trial bar have admitted that certain state courts have become "magic jurisdictions," where non-resident corporate defendants are unlikely to obtain a fair trial. Diversity jurisdiction is an important, necessary, and appropriate recourse for non-resident defendants who face lawsuits in these jurisdictions.

By creating a new hurdle for establishing fraudulent joinder, the Fifth and Third Circuits have fundamentally altered the right of a non-resident defendant to obtain a federal forum on the basis of statutory diversity jurisdiction. Indeed, in many cases, the common defense rule will enable a plaintiff to keep a meritless case against a non-resident defendant out of federal court simply by asserting the same meritless claims against a resident defendant. This is exactly the sort of manipulation of federal jurisdiction that the fraudulent joinder doctrine was intended to prevent.

Moreover, without this Court's intervention, the availability of diversity jurisdiction will differ depending upon where the state court suit is filed, and this disparity will exacerbate the problem of forum shopping in business tort cases. Indeed, if the Fifth Circuit's decision is allowed to stand, the states within that circuit — which already attract a disproportionate number of business tort lawsuits — will become even more attractive to the plaintiffs' bar, as a suit filed within that Circuit will be more likely to remain in state court than a suit filed elsewhere.

The petition demonstrates why review is warranted, given the conflict of authority with regard to the common defense exception to fraudulent joinder. Accordingly, in order to avoid burdening the Court with a duplicative discussion of the case law, this brief will focus on three particular aspects of the issue from the perspective of national commerce. First, this brief discusses how the common defense rule adopted by the Third and Fifth Circuits undermines a defendant's right to diversity jurisdiction and exacerbates the very harms that the doctrine of fraudulent joinder was designed to prevent. Second, it evaluates the doctrine's relevance in terms of the growing problem of bias against non-resident corporate defendants in certain "magic" state court jurisdictions. And finally, this brief discusses the practical and historical context of *Cockrell*,

which the Fifth and Third Circuits ignored when they used that ninety-year-old decision to create the new exception to fraudulent joinder.

For all these reasons, and for those set out in the Petition, Amici urge this Court to grant a writ of certiorari in this matter. This Court's intervention is necessary to resolve the split among the circuits, to prevent any further misuse of its decision in *Cockrell*, and to clarify the scope of diversity jurisdiction.

BACKGROUND

Respondent Kelli Smallwood is a Mississippi resident who was injured when her car collided with a locomotive at a railroad crossing in Florence, Mississippi. Smallwood filed an action in Mississippi state court against the Illinois-based Illinois Central Railroad Company, which operated the train, as well as against the Mississippi Department of Transportation (MDOT), which controlled the crossing. Smallwood claimed that MDOT negligently provided inadequate warning devices at the railroad crossing and that both defendants were negligent in delaying the installation of additional warning devices.

Illinois Central removed the case to federal court on the ground that MDOT could not possibly be held liable in the case and thus its citizenship could be ignored for purposes of diversity jurisdiction. The railroad argued that Smallwood had no chance of recovering against MDOT (the resident defendant) because the Federal Railroad Safety Act preempted both of the claims against it. See 49 U.S.C. § 20101, et seq. The district court agreed, found that MDOT had been improperly joined, and denied Smallwood's motion to remand. The court then granted summary judgment in favor of Illinois Central based on the same preemption defense.

On appeal, a panel of the Fifth Circuit concluded that Illinois Central had not carried its burden of showing fraudulent joinder and ordered that the district court remand the matter to state court. The Fifth Circuit then agreed to hear the case en banc.

In a sharply divided opinion, the en banc court voted to adopt a common defense exception to the doctrine of fraudulent or "improper" joinder. Pet. App. 8a-9a. Under this new rule:

> When the only proffered justification for improper joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made.

Pet. App. 8a. In such a case, according to the majority, "there is no improper joinder; there is only a lawsuit lacking in merit." *Id.* at 7a.

The majority based its conclusion in significant part on its interpretation of this Court's decision in *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U.S. 146 (1914), which also considered the question of diversity jurisdiction in a case against a non-resident railroad. In that case, however, the alleged liability of the railroad was based exclusively on its vicarious liability for the actions of the two resident defendants. This Court held that the mere argument that the plaintiff's allegations against the defendants were each and all "false and untrue" was not sufficient to establish fraudulent joinder, because it "manifestly went to the merits of the action as an entirety, and not to the joinder." 232 U.S.

at 151, 153. The *Smallwood* majority used this Court's decision in *Cockrell* as a basis for its decision that a finding of fraudulent joinder can never rest on a defense that is "common" to all defendants—even if there is no reasonable possibility of recovery against the resident defendant. Pet. App. 7a-8a. In doing so, the majority did not address the fact that, rather than asserting and proving a defense to the claims against the in-state defendant, the defendants in *Cockrell* merely denied the factual allegations. The majority also did not consider the fact that *Cockrell* was handed down before *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), at a time when federal courts were more reticent to delve into matters of state law.

Judge Jolly authored the lead dissenting opinion, in which six of his colleagues joined. The dissenters rejected the majority's common defense rule, explaining that the majority's opinion

> misreads the Supreme Court decision [in *Cockrell*], disregards established precedent, designs a troublesome and unnecessary "common-defense" rule to amend a long established and fairer rule, offers meaningless reasoning to support its decision and creates confusion for the district courts—all for no other reason, as far as I can determine, than the satisfaction in finding a "buried treasure" obscured from our judicial predecessors for almost a century.

Pet. App. 12a (Jolly, J., dissenting).

On December 9, 2004, Illinois Central and MDOT filed their petition for a writ of certiorari in this Court.

ARGUMENT

I. The common defense rule exacerbates the very harms that diversity jurisdiction and the fraudulent joinder doctrine are designed to prevent.

A. Diversity jurisdiction gives non-resident defendants a right to an unbiased forum.

For more than 200 years, the basic goal of diversity jurisdiction has been to assure non-resident litigants access to "courts free from susceptibility to potential local bias." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 111 (1945); see also *Burgess* v. *Seligman*, 107 U.S. 20, 34 (1883) (explaining that diversity jurisdiction was established "to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices"); *Pease* v. *Peck*, 59 U.S. (18 How.) 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the state tribunal might not be impartial between their own citizens and foreigners."). It was for that reason that the Judiciary Act of 1789 vested federal courts with original jurisdiction over controversies "between Citizens of different States." U.S. Const. art. III, § 2; see 28 U.S.C. § 1332.

Even in the early days of the federal judiciary, the need for a federal tribunal that would resolve disputes between citizens of different states was based as much on the appearance or apprehension of parochial bias as it was on demonstrable proof that such bias existed. As Chief Justice John Marshall explained in 1809:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to

> parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the U.S. v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); cf. *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) ("It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim.").

Because the identity of the parties is often a matter of pleading within the plaintiff's control, this Court has long recognized a need for a mechanism to prevent a plaintiff from manipulating the pleadings to avoid diversity jurisdiction. To that end, nearly 100 years ago, this Court determined that a plaintiff could not evade diversity jurisdiction by joining as a defendant a non-diverse party against whom he could not prevail. *Wecker* v. *Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907) ("[T]he Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.") (quotations omitted). In *Wecker*, this Court recognized that federal courts "should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Id.* at 186; see also *Alabama Great S. Ry. Co.* v. *Thompson*, 200 U.S. 206, 218 (1906) ("[T]he Federal courts may, and should, take

such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.").[3]

For nearly nine decades after *Wecker*, the federal courts have followed the basic rule that an in-state defendant against whom the plaintiff has no reasonable possibility of prevailing may be disregarded for purposes of diversity jurisdiction. See, *e.g.*, *Travis* v. *Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (test for fraudulent joinder is whether the plaintiff has any "reasonable possibility" of prevailing against the non-diverse defendant); *Schwartz* v. *State Farm Mut. Auto Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (same effect); *B., Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *Smoot* v. *Chicago, Rock Island & Pac. R.R. Co.*, 378 F.2d 879, 882 (10th Cir. 1967) ("The joinder of a resident defendant against whom no cause of action is stated is patent sham, ... and though a cause of action be stated, the joinder is similarly fraudulent if in fact no cause of action exists.") (citations omitted); *Parks* v. *New York Times Co.*, 308 F.2d 474, 476-78 (5th Cir. 1962) (fraudulent joinder is established by showing that the plaintiff cannot prevail against the non-diverse defendant); *Lobato* v. *Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-09 (10th Cir. 1958) (affirming denial of remand where plaintiff had failed to provide facts sufficient to state a claim against in-state defendants); *Morris* v. *E.I. Dupont de Nemours & Co.*, 68 F.2d 788, 792-93 (8th Cir. 1934) (fraudulent joinder is established when a plaintiff has no reasonable possibility of prevailing against the non-diverse defendant).

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[3] The doctrine of fraudulent joinder adopted in *Wecker* is also reflected in the removal statute, 28 U.S.C. § 1441 (b), which provides that an action may be removed on the basis of diversity jurisdiction "only if none of the parties in interest *properly* joined and served as defendants is a citizen of the State in which such action is brought" (emphasis added).

These courts have consistently held that fraudulent joinder is based upon an evaluation of whether the plaintiff has a reasonable possibility under state law of recovering from the resident defendant—without consideration of the plaintiff's actual motives in including that defendant in the pleading. See *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183, 189 (1931) ("[I]n a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined.").

In 1990, the Third Circuit abandoned this long-standing rule, concluding that even if the plaintiff had no hope of recovering from the in-state defendant, that defendant's citizenship could not be disregarded if the defense that would defeat those claims was also dispositive of claims against the out-of-state defendant. *Boyer* v. *Snap-On Tools Corp.*, 913 F. 2d 108 (3d Cir. 1990). The Fifth Circuit's opinion in this case follows *Boyer* and deepens a split between the Third Circuit in *Boyer*, on the one hand, and the Ninth Circuit and (impliedly) the Seventh Circuit on the other. See *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313, 1318-20 (9th Cir. 1998) (expressly rejecting the argument that fraudulent joinder could not exist where the statute of limitations defense that defeated claims against the in-state defendant would also defeat claims against the out-of-state defendants); *LeBlang Motors, Ltd.* v. *Subaru of Am., Inc.*, 148 F.3d 680, 691-92 (7th Cir. 1998) (finding fraudulent joinder based upon statute of limitations defense that would have applied equally to claims against out-of-state defendants).

B. The common defense rule undermines the purposes of the fraudulent joinder doctrine.

The common defense exception to the fraudulent joinder doctrine legitimizes the very sort of manipulation that the doctrine itself was designed to prevent. Under the

Fifth Circuit's rule, a plaintiff with a meritless claim against a non-resident defendant can frustrate that defendant's ability to remove the case simply by asserting the same meritless claims against a resident defendant, in the hopes that a state court would be more likely to allow the meritless claims to proceed. Absent proof of actual fraud— or proof that the claims against the resident defendants fail for additional reasons that apply to them uniquely — the removing defendant in such a case would have no recourse. Thus, the Fifth Circuit has effectively handed the power over the forum to the plaintiff exclusively, even where diversity jurisdiction would otherwise exist.

Indeed, the approach taken by the Fifth and Third Circuits gives rise to an ironic public policy conundrum: a case that is partially valid can be removed, but a case that is totally baseless as to all defendants will be remanded to state court, where that state court may improperly breathe life into the plaintiff's meritless claims.

This issue is of particular significance in business tort cases against corporations in national commerce. Corporate entities act through their agents, and a major national corporation doing business in a particular state is bound to have agents or employees who live there. Under the Fifth Circuit's rule, a plaintiff with a meritless tort claim against the corporation can defeat diversity jurisdiction by asserting the same claims against one of the corporation's in-state employees, as long as the claims against the employee would suffer from the same deficiencies as the claims against the corporation. In this manner, the Fifth Circuit's rule sharply curtails diversity jurisdiction for out-of state corporate defendants in nationwide commerce — the very defendants who most often need the protections of diversity jurisdiction in today's climate.

II. Diversity jurisdiction is particularly important to non-resident defendants who face suit in one of the so-called magic state court jurisdictions.

It is no secret that in certain state courts, a non-resident corporate defendant stands little chance of getting a fair trial. Even if the vast majority of states would fairly adjudicate a private tort suit by one or more of its citizens against a major national corporation, the existence of even a few biased jurisdictions has a tremendously detrimental impact on the orderly operation of commerce in this nation.

These "magic jurisdictions" — so named by some of the most prominent members of the plaintiffs' bar — have developed reputations as extremely friendly to suits against corporate defendants and, as a result, attract a disproportionate amount of business tort and consumer fraud litigation. Richard Scruggs, a leading plaintiffs' lawyer, recently described the attributes of such courts:

> [W]hat I call the "magic jurisdiction" ... [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected .... They've got large populations of voters who are in on the deal .... And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places .... There are probably a dozen magic jurisdictions around the country where this is really a dangerous thing. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.

R. Scruggs, Remarks in a Panel Discussion at the Prudential Securities Financial Services and Regulatory Conference (May 9, 2002) (published under the title *Asbestos for Lunch* by Prudential Financial Research, June 11, 2002); see also J. Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16; Colloquium, *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001) (quoting Richard Scruggs as stating that there are "probably a dozen or so magic jurisdictions around the country that any company that goes to trial there runs the risk of enormous multi-billion dollar punitive damages").

As the former president of the Mississippi Trial Lawyers Association has candidly admitted, resisting removal from one of these magic jurisdictions to federal court tends to be outcome determinative:

> The general public may say, "Who cares — state court, federal court, what difference does it make?" In our state, it's the difference between winning and losing. I've gotten many multimillion-dollar judgments in state court over my 17-year career, but I've never won a judgment of any significant size for plaintiffs in federal court.

R. Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1, *available at* 2001 WLNR 3348715 (quoting Shane F. Langston).

Madison County, Illinois, for example — which some regard as "'the most magic of all' magic jurisdictions" — has developed a well-known reputation for bias against corporate defendants and attracts litigation against defendants from across the nation. See V. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge*

Ahead, 16 WASH. U. J.L. & POL'Y 235, 235-36 (2004) (quoting G. Burns, *Lawyers Bring an International Class Action to Rural Madison County ... Why? Because It's the Lawsuit Capital*, CHI. TRIB., Mar. 8, 2004, at 1). Indeed, Madison County now ranks third nationwide — behind the far more populous counties containing Los Angeles and Chicago — in terms of the number of class action filings each year. J. Beisner & J. Davidson Miller, *They're Making a Federal Case Out of It ... In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 159 (2001).

West Virginia has also established itself as a magic jurisdiction for plaintiffs in mass tort cases. See AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2004, at 23-24 (2004), *available at* www.atra.org ("JUDICIAL HELLHOLES"). One West Virginia Supreme Court of Appeals Justice candidly acknowledged the bias in his jurisdiction more than fifteen years ago, writing, "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone[] else['s] money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me." E. Helland & A. Tabarrok, *Exporting Tort Awards*, REGULATION MAGAZINE, Summer 2000, at 21, 22 (quoting R. NEELY, THE PRODUCT LIABILITY MESS 4 (New York: The Free Press 1988)).

Within the Fifth Circuit, the courts of Mississippi reigned for several years as a "mecca for plaintiffs' claims against out-of-state businesses." *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 774 (5th Cir. 2001). Accordingly, it is not surprising that the Fifth Circuit has faced more than its share of removal petitions and has played a central role in the development of modern removal jurisprudence.

Although Mississippi's attractiveness as a plaintiffs' venue is in decline, thanks to significant legislative and judicial intervention, both of the other states within the Fifth

Circuit still include magic jurisdictions. Jefferson County, Texas and Orleans Parish, Louisiana rank fifth and sixth, respectively, on the American Tort Reform Foundation's annual listing of "Judicial Hellholes." JUDICIAL HELLHOLES, *supra*, at 25-27. In the litigation over the popular diet drug Fen-Phen, for example, a jury in Jefferson County, Texas recently awarded a verdict of $1.013 billion to the family of a single patient who had suffered from primary pulmonary hypertension (PPH) after taking several different diet drugs — a staggering verdict, considering that defendant Wyeth Pharmaceuticals had settled the majority of its Fen-Phen cases (more than 125,000 claims alleging heart valve damage, which is less serious than PPH) for a total of $3.75 billion. *Id.* at 25. And in Louisiana, a court ordered tobacco companies to pay a judgment of $591 million — not for medical costs or to compensate for actual injuries — but to fund a comprehensive smoking cessation program. *Id.* at 27. The defendants in those cases were barred from introducing evidence that the 1998 Master Settlement Agreement (which settled disputes between states' attorneys general and the tobacco industry) was already funding extensive public education campaigns. *Id.*

Given the prominence of these and other "magic" state court jurisdictions both inside and outside the Fifth Circuit, the en banc decision in this case is all the more significant. The adoption of the common defense rule has the potential to fuel the explosion of tort litigation in these jurisdictions. In the Fifth Circuit, for example, the common defense rule—which makes it far more difficult for corporate defendants to remove cases from state court—will provide a continued inducement to plaintiffs' lawyers around the country to choose the courts of Mississippi, Texas, and Louisiana for significant business tort litigation against major national commercial interests. Through the facile expedient of adding a single resident defendant—even where there is no reasonable possibility of recovery against

that defendant or any other—plaintiffs will be able to increase their odds of resisting removal to federal court and will be one step closer to a favorable result. See, *e.g.*, M. Ballard, *Mississippi Becomes a Mecca for Tort Suits; Fayette, Pop. 8,345, Is a Major Venue for Diet Drug Litigation*, NAT'L L.J., Apr. 30, 2001, at A1 (discussing the plight of a family-owned pharmacy in Jefferson County, Mississippi that is named in "nearly every suit" alleging the defective manufacture of diet drugs).

The impact of these developments on nationwide commerce cannot be overstated. Entire industries are frequently the targets of cookie-cutter complaints in these and other magic jurisdictions. In the consumer finance and insurance industries, for example, a veritable flood of cases has been filed by plaintiffs in Mississippi alleging boilerplate tort and contract claims against non-resident companies and their in-state employees or agents. Many of these claims are based on transactions that were entered into as many as ten years ago. These claims frequently are subject to defenses that may be invoked by diverse and non-diverse defendants alike, such as the statute of limitations. See, *e.g.*, *Howard* v. *CitiFinancial, Inc.*, 195 F. Supp. 2d 811 (S.D. Miss. 2002) and *Ross* v. *Citifinancial, Inc.*, 2002 WL 461567, No. 5:01-CV-185BN (S.D. Miss. Mar. 18, 2002), aff'd in *Ross* v. *Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003) (petition for reh'g en banc pending). Plaintiffs in these cases are already relying upon the Fifth Circuit's decision in the instant appeal to argue that the presence of in-state employees and agents as defendants defeats diversity jurisdiction, even though the claims against those individuals are time-barred or otherwise meritless and plaintiffs have no hope of prevailing on them.

Diversity jurisdiction exists to protect against this very sort of unfairness. This Court's intervention is necessary to ensure that the statutory protections of

diversity jurisdiction are respected uniformly in the federal courts and are available to out-of-state defendants who would otherwise be entitled to invoke them.

III. The Fifth Circuit's interpretation of *Cockrell* ignores the historical context of that case.

In adopting the common defense rule, both the Fifth Circuit in *Smallwood* and the Third Circuit in *Boyer* relied heavily on *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U.S. 146 (1914), a nearly century-old and long-dormant decision of this Court. See Pet. App. 7a-8a; *Boyer*, 913 F.2d at 112-13. As the dissent in this case made clear, the Fifth Circuit "misread" and "vastly overstated the implications of *Cockrell*." Pet. App. 19a (Jolly, J., dissenting); see also Pet. at 12-14 (discussing the significant flaws in the majority's analysis of *Cockrell* and the resulting split in the circuits on the meaning of that decision).

In addition to the problems identified by the dissent and by the Petition already filed in this case, the Fifth Circuit's analysis of *Cockrell* also suffers from one other fatal flaw: it ignores the fact that *Cockrell* was decided before this Court fundamentally changed the role of federal courts in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). *Cockrell* was decided under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), in which federal courts were required to adjudicate diversity cases based on federal common law, even when the application of state common law may have resulted in a different outcome. In that context, considerations of comity would almost certainly have made federal courts more reluctant to retain cases based on diversity jurisdiction. After *Swift* was overruled in *Erie*, however, a federal court is now required to interpret, predict, and apply state law in diversity cases. Indeed, after *Erie*, a federal court sitting in diversity is "only another Court of the State" required to apply state law as a state court would. *Guaranty Trust Co.* v.

York, 326 U.S. 99, 108 (1945), overruled on other grounds by *Hanna* v. *Plumer*, 380 U.S. 460 (1965). Given that dramatic change in the role of federal courts, any comity concerns that the Court in *Cockrell* may have had about the propriety of a federal court's evaluation of claims against in-state defendants will have greatly diminished, as the law applied by state and federal courts will now be the same.

It is therefore not surprising that, as the *Smallwood* dissenters observed, "the two most authoritative treatises on federal practice" neither cite *Cockrell* for a "common defense" limitation on the fraudulent joinder doctrine nor intimate that such a limitation even exists (Pet. App. 17a-18a. (Jolly, J., dissenting)), particularly after *Erie* so fundamentally changed the role of federal courts in diversity cases. Indeed, in the case of *Pullman Co.* v. *Jenkins*, 305 U.S. 534 (1939) — issued shortly after *Erie* — this Court confirmed that a non-resident defendant has a broad right to show fraudulent joinder, commenting that "[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Id.* at 541.

CONCLUSION

For all the reasons discussed above, and for the reasons set out in the Petition, Amici urge this Court to grant a writ of certiorari in this case.

Respectfully submitted.

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